

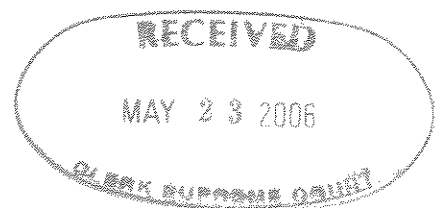
STATE OF MICHIGAN  
IN THE SUPREME COURT

IN RE: PROPOSED ADMINISTRATIVE ORDER  
REGARDING ASBESTOS-RELATED DISEASE  
LITIGATION

ADM File No. 2003-47

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**PETITIONERS' MEMORANDUM IN SUPPORT OF  
ALTERNATIVE A TO PROPOSED ALTERNATIVE ADMINISTRATIVE  
ORDERS REGARDING ASBESTOS-RELATED DISEASE LITIGATION**



## INTRODUCTION

Since the original Petition for an Inactive Asbestos Docket was filed with this Court, the burden imposed by asbestos litigation on Michigan Courts has continued to increase. In 1999, the backlog of cases in the Wayne Circuit Court was 550 cases. By the end of 2002, the number had tripled to 1,500. Between 2002 and 2005, on average, more than 1,000 new asbestos cases were filed in Michigan Courts each year. The total backlog at the present time in Wayne County Circuit Court alone is over 2,400 cases.

Petitioners submit this Memorandum to request that this Court adopt Alternative A from its Proposed Administrative Order Regarding Asbestos-Related Disease Litigation, dated February 23, 2006. To avoid repetition of the practical and legal arguments Petitioners have already submitted to this Court in support of asbestos litigation reform, Petitioners rely upon all legal memoranda they previously submitted in support of their original petition.

Alternative A, as posed by this Court, appears to be the most efficient and straightforward proposal to administer the current Michigan asbestos docket. As set forth below, the differences between Alternatives A and B highlight the ease with which Alternative A can be administered.

## ANALYSIS

### **A. Alternative A Provides a Simple, Clear and Understandable Description of the Medical Documentation that an Objectively Impaired Plaintiff Must File to Ensure Timely Litigation Of His or Her Claim**

Under Alternative A, all asbestos personal injury cases transferred to or filed in the Third Judicial Circuit are placed on either the "active" or "inactive" docket. (Alternative A, ¶ 5). Under Alternative B, in contrast, all asbestos personal injury cases transferred to or filed in the Third Judicial Circuit are classified as either "Tier I" or "Tier II" cases. (Alternative B, ¶ 5). In general, under either Alternative, a case can only be litigated, if the plaintiff has been diagnosed

with a genuine, asbestos-related malignancy, or the plaintiff files materials satisfying the ABA standard for nonmalignant asbestos-related disease claims (February 2003). (*See generally*, Alternative A, ¶ 5; Alternative B, ¶ 5).

There is a subtle distinction, however, between Alternatives A and B regarding the necessary materials a plaintiff must file to be placed on either the "active" (Alternative A) or "Tier I" (Alternative B) dockets if the plaintiff has been diagnosed with an asbestos-related malignancy. Under Alternative A, with regard to malignancy cases only, the plaintiff must file a "physician's affidavit" stating that the person injured has been diagnosed with mesothelioma, lung cancer, or "some other malignancy as a result of exposure to asbestos... ." <sup>1</sup> (Alternative A, ¶ 5)). Under Alternative B, for a plaintiff's case to be classified as "Tier I", the plaintiff can file either a "medical report" **or** an "affidavit of a physician" stating that the plaintiff has been diagnosed with mesothelioma, lung cancer, or "some other malignancy as a result of exposure to asbestos... ." (Alternative B, ¶ 5(a)).

The meaning of "medical report" under Alternative B, is unclear, ambiguous and will likely lead to problems in the administration of Alternative B. In contrast to a "physician's affidavit", the meaning of which is self-evident, the term "medical report" is problematic. What constitutes a "medical report"? Who can author a "medical report"? How can the trial court interpret a "medical report" to discern whether what is contained in the "medical report" actually constitutes a diagnosis of an asbestos-related malignancy? These questions, among others, are likely to contribute the confusion surrounding the administration of Alternative B.

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<sup>1</sup> Alternatives A and B contain identical language with regard to nonmalignancy cases. Both Alternatives permit a plaintiff to file "materials satisfying the ABA standard for nonmalignant asbestos-related disease claims (February 2003)." (Alternative A, ¶ 5(a)-(b)).

**B. Alternative A Provides an Efficient and Effective Method to Transfer Cases from "Inactive" Status to "Active" Status Should a Plaintiff Develop an Objective, Asbestos-Related Malignancy or Impairment After the Filing of His or Her Case**

Under Alternative A, if a case is placed on the "inactive" docket, no further proceedings can occur, and no discovery shall be ordered, although the parties can voluntarily engage in discovery. (Alternative A, ¶ 6). Alternative A also provides a mechanism by which the plaintiff can petition the court to move his or her case to the "active" docket and thereby litigate the case immediately upon the manifestation of the objective impairment criteria. A case will be transferred to the "active" docket under Alternative A if the plaintiff demonstrates that he or she meets the criteria for "active" status (i.e., the plaintiff develops an asbestos-related malignancy or satisfies the ABA objective criteria for nonmalignant impairment). (*Id.*, ¶ 6(a)).

In contrast, there seems to be an added layer under Alternative B in order for a plaintiff to achieve a transfer of his or her case from "Tier II" to "Tier I". Under Alternative B, all "Tier I" cases shall be resolved by judgment or dispositive order before any "Tier II" case can be docketed for further proceedings. (Alternative B, ¶ 6). This suggests that once a case is classified as a "Tier II" case, it cannot be transferred to "Tier I" status, under any circumstances, until **all** "Tier I" cases are resolved. Alternative B appears to impose a much higher standard than Alternative A for a plaintiff to petition the trial court for a transfer of his or her case to the active case ranks. This may lead to situations where a plaintiff, who did not meet the objective criteria for impairment when he or she filed suit, but subsequently developed a condition that meets the objective impairment criteria, is still forced to wait, perhaps indefinitely, to litigate his or her case until **all** prior cases within "Tier I" have resolved.

Alternative B will prove to be difficult and cumbersome to manage, mainly because it is likely there will never be a point at which there are no pending "Tier I" cases. Under Alternative

B, the status of a case (i.e., "Tier I" or "Tier II") is determined upon the filing of the case. (Alternative B, ¶ 5). It is likely that new cases filed after the adoption of the administrative order will be classified as "Tier I". In the event of continued "Tier I" filings, under Alternative B, since "Tier I" cases must be resolved before any "Tier II" cases can be transferred, no "Tier II" case will ever be transferred to "Tier I". This imposes a considerable burden to litigating genuine, asbestos impairment claims.

Alternative B also intermixes the concepts of "active" and "inactive" dockets, without defining those concepts, with the "Tier I" and "Tier II" terminology. Alternative B states that a plaintiff in a "Tier II" case may voluntarily place his or her case on the "inactive docket". (Alternative B, ¶ 7). This is the first reference to the "active/inactive" concept under Alternative B and the terms are not defined in any preceding paragraphs of Alternative B. Under Alternative B, cases on the "inactive" docket shall remain on the "inactive" docket until certain conditions are met.<sup>2</sup> Alternative B, however, does not state what happens to a case that is transferred from the "inactive" docket. It is unknown what happens when a plaintiff files a motion to remove it from "inactive" status. For instance, it is unclear whether such a case will be transferred to "Tier I" status. This mechanism under Alternative B is unclear and will prove unworkable.

### **C. A suggested Amendment to Alternative A**

Alternative A provides that "cases on the inactive docket shall not be joined with cases from the active docket for settlement or any other purpose." Petitioners suggest that the Court

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<sup>2</sup> The conditions required to move a case from the "inactive" docket under Alternative B are identical to the conditions stated in Alternative A required to remove the case from the "inactive" docket: (1) upon a motion of a party, the case is transferred to the "active" docket upon a showing that the requirements to meet the criteria for "active" status are met; or (2) the case is dismissed by stipulation of the parties; or (3) the case is dismissed by order on the court's own motion, or on the motion of a party, after notice and opportunity to be heard. (*Cf.*, Alternative A, ¶ 6 and Alternative B, ¶ 7).

may wish to consider a similar prohibition against consolidating cases on the active docket for trial. Each asbestos case involves exposure to different products, over different periods of time, with different disease processes, and different treating doctors. To consolidate cases for trial can only be prejudicial to the Defendants and impose an undue burden on juries. Each case should stand or fall on its own merits and be tried separately.

### CONCLUSION

Given the relative simplicity with which Alternative A can be implemented, Petitioners request that this Court adopt Alternative A as the administrative order governing all asbestos case filings in the State of Michigan.

Respectfully Submitted,  
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This Brief is submitted on behalf of those Michigan companies who are Defendants in Michigan asbestos cases and who joined in the original Petition with two exceptions. Hollinger and Company has withdrawn its support and Goodyear Tire and Rubber Co. joins with the original petitioning companies.

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